

JOHNATHAN G. BROWN,  
  
Claimant,  
  
v.  
  
KEELY’S DRYWALL, INC.,  
  
Employer,  
  
and  
  
LIBERTY NORTHWEST  
INSURANCE CORPORATION,  
  
Surety,  
  
Defendants.

## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

LIBERTY NORTHWEST  
INSURANCE CORPORATION,  
  
Surety,  
  
Defendants.

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Boise on October 1, 2004.

Claimant was present in person and represented by Stephen K. Stark of Nampa; Defendants were represented by Monte R. Whittier of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of two post-hearing depositions, the submission of briefs, and subsequently came under advisement on December 28, 2004.

## **ISSUES**

The noticed issues to be resolved as a result of the hearing are:

1. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;
2. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof; and,
3. Whether Claimant is entitled to attorney's fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

Claimant withdrew the noticed issue of whether he was entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 at hearing when Defendants agreed to pay an outstanding, but unsubmitted, medical bill. (Transcript, p. 5). Defendants also indicated they would authorize the removal of the malleolar screw in Claimant's right ankle whenever he chose to proceed. (Transcript, p. 5; Responsive Brief, p. 20). Defendants withdrew the noticed issue of whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 was appropriate at hearing. (Transcript, p. 6).

## **ARGUMENTS OF THE PARTIES**

Claimant argues he is entitled to the 8% of the whole person PPI given him by Dr. Garber, who surgically repaired the displaced interarticular fracture of his right ankle. He further argues he is facing a Hobson's choice regarding employment. He can either continue working as a drywaller, albeit less effectively due to his injury, and making less than he did before since he is now just another grunt with no guarantee how much longer he can hang on, or he could find a lighter duty niche and suffer an immediate wage loss of over 50%. In any event, he argues he will ultimately

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have to cease hanging dry wall, and when he does, he will be up the creek without a paddle wage wise. He seeks a PPD rating of about 40% of the whole person.

Claimant also argues he is entitled to attorney's fees since Defendants' screwed back together argument that a displaced fracture can be fixed with a screw is inherently unreasonable, and is like saying a cracked baseball bat can be fixed with a screw. He further argues he should have the right to rely on the written promise of Surety to pay the 8% of the whole person PPI awarded by Dr. Garber, and that Surety unreasonably discontinued benefits when they reneged on their promise to pay the full 8%.

Defendants counter PPI ratings are based upon a final outcome after a claimant has reached medical stability. They then argue the rating of Dr. Nicola should be accepted since he based his rating on the final results of Claimant's healing process, whereas Dr. Garber based his rating on Claimant's injury. Defendants further argue the source of Claimant's "vague ankle pain" is probably the malleolar screw he so far has chosen not to have removed. They also maintain Claimant's argument that he is somehow unable to work and earn the income that he did before his injury is as fractured as his baseball bat, and that changing business conditions, *i.e.*, a contractor requiring its subcontractors to carry their own workers' compensation insurance, does not entitle someone to a disability rating. Defendants further argue Claimant has totally failed to show that he has had a reduction in income, that the evidence would tend to indicate that he has actually had an increase in income after his industrial accident, and that any arguments to the contrary are based on nothing but speculation and the hope the Commission will somehow find that he has suffered a loss of income due to his injury. Defendants argue it is absurd to think that any defendant cannot rely on the opinion of a board certified orthopedic surgeon, and maintain the issue of PPI is always open until

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3**

either a lump sum agreement is entered into or the Commission makes a determination as to an appropriate rating. They ask the Commission to find that Claimant is entitled to the 1% of the whole person PPI awarded by Dr. Nicola for his condition at medical stability, and deny his claims for PPD and attorney's fees since he has failed to show he has suffered any disability in excess of impairment and that he has failed to show they have acted unreasonably.

In rebuttal, Claimant argues the Commission should accept the average weekly wage listed for him in Defendants' Answer as an accurate representation of his pre-injury capacity to earn, and that he has presented ample evidence to demonstrate his ability to engage in gainful activity has been and will be impacted. He further argues, that due to his injury, he could not afford to continue as a subcontractor, but that even if he did, the Commission cannot assume he would earn what he did pre-injury for any extended period of time. Claimant also argues the opinions of Dr. Garber are more accurate than those of Dr. Nicola, particularly since he was Claimant's treating physician, and Dr. Nicola only saw him once for an IME.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the October 1, 2004, hearing;
2. Claimant's Exhibits 1 through 6 admitted at the hearing;
3. Defendants' Exhibits A through H admitted at the hearing;
4. The deposition of Sidney J. Garber, M.D., taken by Claimant on October 4, 2004;
5. The deposition of George A. Nicola, M.D., with Exhibit 1, taken by Defendants on November 4, 2004; and,
6. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, (AMA

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4**

*Guides*) of which the Referee takes notice.

Defendants' objection on p. 6 of Dr. Garber's deposition is sustained; their objection on p. 12 is overruled.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. At the time of the hearing, Claimant, a journeyman drywall hanger, was 34 years old and living in Parma. He has hung drywall for 16 years and has traveled to job sites all over the Treasure Valley to work.

2. Claimant began working for Employer on January 2, 2000. On May 27, 2003, he fractured his right ankle in an industrial accident. While carrying two sheets of sheetrock, Claimant stepped on a water pipe, his foot slipped from underneath him, and the sheetrock fell on his ankle. At the time, he was a subcontractor for Employer running his own crew. Employer provided workers' compensation insurance for their subcontractors and the subcontractor's crews.

3. Claimant was diagnosed with a displaced medial malleolar fracture of the right ankle after seeking medical care at a local health clinic. On June 2, 2003, Sidney J. Garber, M.D., performed an open reduction and internal fixation of the fracture using a malleolar screw at West Valley Medical Center in Caldwell. Claimant had been referred to Dr. Garber by the health clinic. A course of physical therapy and work hardening followed the surgery at Idaho Physical Therapy in Caldwell.

4. Dr. Garber released Claimant to return to work on October 9, 2003, and subsequently

discharged him from care on October 23, 2003. The physical therapy had ended on October 3, 2003.

5. While Claimant was still in a period of recovery, Surety asked the Industrial Commission Rehabilitation Division – Payette to assist him in returning to work with Employer. The case was assigned to Consultant Sidni Mordhurst. Consultant Mordhurst completed a job site evaluation (JSE) of Claimant's pre-injury position with Employer. She then submitted the JSE to Dr. Garber who approved it on October 10, 2003. Claimant subsequently resumed his former position with Employer in late October 2003 after Dr. Garber released him to return to work.

6. In a letter to Claimant's attorney dated October 27, 2003, Dr. Garber opined Claimant had reached maximum medical improvement and assigned him a PPI rating of 8% of the whole person. The rating was taken from Table 17-33, Impairment Estimates for Certain Lower Extremity Impairments, of the *AMA Guides* and represents an intra-articular fracture of the ankle with displacement. Dr. Garber further opined Claimant could return to work as a drywall hanger, but that only time would tell if he could perform the job. He gave no permanent work restrictions.

7. At Surety's request, Claimant saw George A. Nicola, M.D., for an IME on November 24, 2003. Dr. Nicola noted Claimant's ankle fracture was well healed without deformity and in anatomic position. He further noted Claimant was complaining of pain in the area of the large malleolar screw placed by Dr. Garber, and opined his pain was directly related to the screw. Dr. Nicola offered to remove the screw, but Claimant declined. He further opined Claimant was medically stable, that he had no restrictions on his ankle, and that he had a PPI rating of 1% of the whole person based on a mild loss of inversion-eversion of the hindfoot. The rating is taken from Table 17-12, Hindfoot Impairment Estimates, of the *AMA Guides*. The only further medical treatment Dr. Nicola recommended was the removal of the screw at Claimant's convenience.

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8. Dr. Nicola did not agree with the PPI rating given by Dr. Garber, indicating Dr. Garber's rating was for an interarticular fracture with displacement, and that the fracture was no longer displaced since it had been anatomically reduced.

9. Surety converted the two whole person PPIs given by Drs. Garber and Nicola to lower extremity impairment ratings and averaged them; their average was 10.5% of the lower extremity. They began paying the 10.5% award on December 5, 2003. The Referee notes the correct average is 11% ( $20 + 2 = 22 \div 2 = 11$ ); using Table 17-33 of the *AMA Guides*, 8% of the whole person is 20% of the lower extremity, not the 19% used. Under Table 17-3 of the *AMA Guides*, either lower extremity rating converts to a 4% of the whole person PPI rating.

10. On March 5, 2004, Surety notified Claimant their use of an averaged rating was inappropriate, that he was only entitled to the 2% lower extremity rating given by Dr. Nicola, that he had been overpaid, but that they were not, as of then, requesting reimbursement of the overpayment.

11. Claimant left Employer on January 1, 2004. Employer had began requiring its subcontractors to provide their own workers' compensation insurance; they also started paying them more to compensate for their increased costs. Claimant decided not to get his own insurance.

12. As a subcontractor, Claimant was paid by the foot; his crew was paid by the hour. The larger and more efficient the crew, the more he made provided the work was available. Claimant averaged approximately \$500 more per month in income during November and December 2003 than he had during January, February, March, or April 2003; these were the only full months Claimant worked during 2003, and reflect his actual income immediately before and after his industrial injury.

13. Claimant subsequently went to work for another one of Employer's subcontractors.

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After several months, he went to work for Standard Drywall, Inc. Claimant maintains his income dropped after he went to work for the other contractors, and that he was required to perform more labor intensive work. The Referee notes it is impossible to draw any conclusions regarding any claimed wage loss from the documents submitted to the Commission; a yearly wage summary without knowing the actual time periods worked is meaningless.

14. At his attorney's request, Claimant saw Dr. Garber for an IME on September 10, 2004. Dr. Garber noted Claimant's right ankle continued to be painful and would swell periodically, and that it was impacting his ability to hang drywall. He also noted Claimant's ability to plantarflex and dorsiflex was less in his right foot than in his left, and that he had decreased inversion of the right foot when compared to the left. Dr. Garber indicated that even though there was currently no displacement, his ankle had not been restored, as demonstrated by his continuing problems. He further opined the proper PPI rating for Claimant was the 8% of the whole man for intra-articular fracture with displacement since ratings can be based on diagnosis, and on the impact the condition had on an individual's ability to perform the activities of daily living. Dr. Garber also opined Claimant should seek work that did not require him to continually step-up on platforms while carrying heavy loads, and that Dr. Nicola's PPI rating was erroneous.

15. In a letter to Surety dated September 22, 2004, Dr. Nicola opined the September 10, 2004, x-rays of Claimant's right ankle showed a medial malleolus screw with a well-healed medial malleolus fracture with no evidence of arthritis. He further opined Claimant's pain over the inside of his ankle would be relieved if the screw were removed, but that otherwise, he should have no further problems stemming from the fracture. Dr. Nicola also indicated he stood behind his previous PPI rating.

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16. Dr. Garber and Dr. Nicola are/were orthopedic surgeons at West Idaho Orthopedic and Sports Medicine in Caldwell. At some point in time during the course of this matter, Dr. Garber retired and moved to California; Dr. Nicola continues to practice in Caldwell.

17. At hearing, Claimant maintained his ankle hurts all the time, and that as a consequence, both the quality and quantity of his work has tapered off. He also maintained he was taking OTC pain medications to relieve the pain in his ankle while working.

18. At his post-hearing deposition, Dr. Garber opined the malleolar screw was not causing Claimant's right ankle pain, that removing the screw would not have any long-term effects on his present or future pain, and that Claimant would likely experience arthritic changes in the joint. He attributed Claimant's pain to the traumatic nature of the injury in a very big man, and the expected sequela of this type of injury, including scar tissue and the continual abuse of the ankle while lifting. Dr. Garber reiterated his prior 8% PPI rating, indicating the rating looked at the big picture and most accurately described the type of injury Claimant had suffered. He also indicated the rating served as a starting point, and that he looked at Claimant's final result, his pain and discomfort, the medication he required, and the changes in his lifestyle and job in making the rating. Dr. Garber also indicated, that in the alternative, measuring Claimant's loss of ankle range-of-motion, he would have a PPI rating of 3% of the whole person. The rating was taken from Table 17-11, Ankle Motion Impairment Estimates, of the *AMA Guides*, and represents a mild loss of extension motion. Dr. Garber acknowledged there was no longer a fracture or displacement of Claimant's ankle.

19. At his post-hearing deposition, Dr. Nicola opined the malleolar screw was no longer serving any purpose and should be removed, and that a ligament rubbing over the head of the screw

could cause the vague ankle pain Claimant described. He further opined Dr. Garber did a good job surgically, that the fracture had healed, that if Claimant was having any residual discomfort, the screw should come out, and that he could go back to work without any restrictions. Dr. Nicola stated he gave Claimant a 1% of the whole person PPI rating based on decreased motion in the subtalar joint causing inversion/eversion, but no rating for the actual fracture because it had healed. He also opined ratings should be given at the time of medical stability. Dr. Nicola acknowledged there was a possibility Claimant's ankle pain was due to scar tissue and other factors.

## **DISCUSSION**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1.       **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

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Dr. Nicola assigned Claimant a PPI rating of 1% of the whole person for a mild loss of inversion-eversion of the hindfoot. The rating is taken from Table 17-12, Hindfoot Impairment Estimates, of the *AMA Guides*. Dr. Garber initially assigned Claimant a PPI rating of 8% of the whole person for an intra-articular fracture of the ankle with displacement for his ankle. The rating was taken from Table 17-33, Impairment Estimates for Certain Lower Extremity Impairments, of the *AMA Guides*. This rating represents Claimant's injury; Dr. Garber acknowledged at his deposition that there was no longer a fracture or displacement of Claimant's right ankle. Moreover, under the statutory scheme, an impairment rating is given after maximal medical rehabilitation has been achieved and the condition is considered stable or non progressive at the time of evaluation.

Dr. Garber also opined, that in the alternative, Claimant would have a PPI rating of 3% of the whole person due to loss of ankle range-of-motion. The rating was taken from Table 17-11, Ankle Motion Impairment Estimates, of the *AMA Guides*, and represents a mild loss of extension motion. This rating, and the rating assigned by Dr. Nicola, represent different range-of-motion losses, and under the *AMA Guides* are added together to arrive at a final PPI rating. The Referee finds the addition of these two ratings appropriate in this matter since pain has already been factored in. Thus, the Referee concludes Claimant is entitled to a permanent partial impairment (PPI) rating of 4% of the whole person. Defendants are entitled to credit for any PPI benefits previously paid.

2. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected

by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

While Claimant has been awarded a PPI rating of 4% of the whole person for his right ankle, he has not been given any permanent work restrictions by either Dr. Garber, or by Dr. Nicola, the only two physicians to have evaluated him after he injured his ankle. Moreover, Claimant returned to work as a subcontractor for Employer, running his own crew, after he was declared medically stable and released to work by Dr. Garber, his treating physician. This is the same position Claimant

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held prior to his industrial accident. His average earnings for the two whole months after he returned to work was greater than the average for the four whole months he worked prior to his injury. There is no indication in the record, outside Claimant's assertions, that he earned less hanging drywall after he decided not to continue as a subcontractor for Employer and go to work for another subcontractor, and then later for a competitor of Employer. In fact, based on the Claimant's testimony and the wage statement from Standard Drywall, Defendants convincingly argue Claimant actually made more working for Standard than he did for Employer as a subcontractor. In addition, Claimant has not shown any loss of access to his job market; he continues to be employed as a drywall hanger. Any assertion of future wage loss is pure speculation, as is the statement that any alternative employment would involve an immediate reduction in pay of over 50%. The Referee finds Claimant has not demonstrated that his ability to engage in gainful activity has been reduced. Thus, the Referee concludes Claimant is entitled to a permanent partial disability (PPD) rating of 4% of the whole person inclusive of his permanent impairment. There is no PPD above PPI.

3. **Attorney's Fees.** Idaho Code § 72-804 provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code

§ 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

Claimant seeks attorney's fees for what he characterizes as Defendants' unreasonable argument that a displaced fracture can be fixed with a screw. He also argues he should have the right to rely on the written promise of Surety to pay the 8% PPI awarded by Dr. Garber, and that Surety unreasonably discontinued benefits when they reneged on their promise to pay the full 8%. Defendants counter they can rely on the opinion of a board certified orthopedic surgeon for a PPI rating, and that the issue of PPI is always open until either a lump sum agreement is entered into or the Commission makes a determination as to an appropriate rating.

Idaho Code § 72-804 provides for an award of attorney's fees under a limited set of circumstances. Defendants accepted Claimant's claim for compensation, paid for his medical care, paid time-loss benefits, paid an impairment rating, and offered to pay for the removal of the malleolar screw in his right ankle. While Defendants' conduct relative to the payment of PPI benefits may be questionable, their conduct is not unreasonable under the Statute; all compensation provided for by law has been paid. Thus, the Referee concludes Claimant is not entitled to attorney's fees as provided for by Idaho Code § 72-804.

### **CONCLUSIONS OF LAW**

1. Claimant is entitled to a permanent partial impairment (PPI) rating of 4% of the whole person. Defendants are entitled to credit for any PPI benefits previously paid.
2. Claimant is entitled to a permanent partial disability (PPD) rating of 4% of the whole person inclusive of his permanent impairment. There is no PPD above PPI.

3. Claimant is not entitled to attorney's fees as provided for by Idaho Code § 72-804.

### **RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED In Boise, Idaho, this 29th day of December, 2004.

### **INDUSTRIAL COMMISSION**

/s/ \_\_\_\_\_  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of January, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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/s/ \_\_\_\_\_